**F. G. Lieb Construction Company *and* Laborers' Local 17, Laborers' International Union of North America, AFL–CIO.** Case 3–CA–17033

May 28, 1993

## DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On February 5, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a brief in support of exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

## ORDER

The Respondent, F. G. Lieb Construction Company, Cincinattus, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Alfred M. Norek, Esq.*, for the General Counsel.
*Ross P. Solomon, Esq.*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 12, 1992, in Albany, New York. The complaint, which issued on June 29, 1992, and was based on an unfair labor practice charge filed on April 20, 1992, by Laborers' Local 17, Laborers' International Union of North America, AFL–CIO (the Union) alleges that F.G. Lieb Construction Company (Respondent) violated Section 8(a)(1)(5) of the Act by failing to continue in full force and effect certain terms of its collective-bargaining agreement with the Union, more specifically, article 30, relating to contributions to the Union's Health, Pension, Training/Education and the L.E.C.E.T. Fund and the Savings Fund Single Stamp Payment.

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a sole proprietorship owned by Gina Lieb has maintained its principal office and place of business in Cincinattus, New York, where it is engaged as an excavation contractor in the construction industry. During the 12-month period preceding June 1992, Respondent derived gross revenue in excess of $1 million from performing services and providing materials to Westinghouse Environmental (Westinghouse), which is directly engaged in interstate commerce. I find that Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION STATUS

Joseph Libonati, field representative and vice president of the Union, testified that the Union has collective-bargaining agreements with individual employers (including Respondent) as well as multiemployer associations. Employees participate in the Union by electing its officers, stewards, and by attending periodic union meetings. The Union, with about one thousand members, exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### III. FACTS AND ANALYSIS

In about April or May 1991[1] Libonati learned that Westinghouse was the low bidder on a sludge excavation job in Napanoch, New York (the jobsite), awarded by the New York State Environmental Conservation Department. As a result of speaking with representatives of Westinghouse, a meeting took place on August 15 between representatives of Respondent and the Union. The meeting was attended by Libonati and Jeffrey Diorio (who did not testify), another union field representative, and Gina Lieb, the owner of Respondent, and her husband Fred Lieb. Libonati testified that, at this meeting, he gave Gina Lieb a copy of the Union's contract and, while she reviewed it, Fred Lieb asked him some questions about the contract which he answered. During this meeting, the Liebs said that they wanted to bring one or two of their supervisors from their principal office to the jobsite and Libonati said that the Union had no problem with them bringing supervisors on the site. At the conclusion of the meeting Gina Lieb signed the agreement. Libonati testified that he never said at this meeting, or at any time thereafter, that fringe benefit contributions under the contract did not have to be made for all employees performing laborers' work at the jobsite.

Fred Lieb testified that at this meeting:

> I discussed with them that I had some guys from home that's been with me a long time. And they were down here working. And I said, I'll put two of your people on right now and work side by side. It was not a problem. They've done that in the past. And that's all that was said.

He testified that there was no discussion about benefits to the men. Gina Lieb testified that at this meeting there was a conversation between Libonati and Fred Lieb about the fringe benefits:

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1991.

> That there was no problem with the union, their union people working alongside our non-union people and that the benefits would only be paid to the hall for the union people, not for the non-union people.

The contract, which is effective for the period June 1, 1990 through April 30, 1993, provides, at Article 30, a requirement that the employers make specified payments to certain fringe benefits, the Health Benefit Plan, the Pension Fund, the Training/Education Fund, the L.E.C.E.T. Fund (Laborers-Employers Cooperation and Education Trust Fund) and the Savings Fund. The contract provides that the employers contribute to these funds by purchasing stamps in the specified amounts from the Union and then give these stamps to their employees along with their pay. Article 30 also provides:

> The Union shall refuse to furnish employees to any employer until there is satisfactory evidence that the Employer has purchased the stamps. Such refusal by the Union shall not be deemed a breach of this agreement.

Article 23 of the agreement provides that ''no member of the Union shall be required to work against his will with nonunion employees.''

Wayne Mackey, a union member, was referred to the jobsite by the Union in about the middle of August and worked there as a laborer from that time until November 6. Sometime after Mackey began, union member Calvin Warren was referred to the jobsite, but only stayed about 1 week. Union member Patrick Galietta began working at the jobsite on about October 23. Admittedly, union stamps were purchased only for these three employees. The other employees on the jobsite performing laborers work were not members of the Union. Mackey and Galietta walked off the jobsite on November 6 and never returned. They testified that they walked off because of Respondent's delinquencies on the fringe benefits. Respondent alleges that they walked off because of a jurisdictional dispute with another union at the jobsite. I refused to allow testimony in this regard as it is irrelevant to the ultimate determination herein. Work at the jobsite concluded on about September 17, 1992.

There was a substantial amount of testimony about which employees, other than Mackey, Galietta, and Warren performed laborers' work at the jobsite. Mackey testified about three named individuals and two that he could not name who performed laborers' work at the jobsite. Respondent's payroll records for the week ending August 24, lists ''Union labor'' for Mackey and Warren, and ''Laborer'' for five other employees. The classifications, ''Union Operator'' and ''Teamster'' are also included for other employees. Gina Lieb's testimony on this subject was vague and a model of avoidance. She did testify, however, that employee Michael Rice was a laborer at the jobsite and that Respondent employed laborers at the jobsite after Mackey and Galietta walked off on November 6. James Knott, who was employed by Respondent as assistant project manager at the jobsite, testified that the job classifications listed in Respondent's payroll records did not necessarily indicate the work being performed by the employees. Rather, this was a suggestion by Westinghouse to simplify the payroll. He did, however, name three nonunion individuals who performed laborers' work at the jobsite.

Soon after Mackey began at the jobsite, Respondent began falling behind in its purchase of the stamps from the Union covering the fringe benefits of Mackey and Warren. Eventually, Respondent caught up and purchased all the required stamps for the three union employees. Admittedly, Respondent never paid for any of the fringe benefits for the other employees at the jobsite who performed laborers' work. Libonati testified that in about early September, when he saw Respondent's Stamp Purchase Orders he realized that Respondent was not fully complying with its agreement. He first called Fred Lieb, and said that he wanted the fringe benefits paid for all laborers working at the jobsite, but received no response. A few days later he called Gina Lieb and told her of the alleged delinquency. She told him that he wasn't going to get the money: ''kind of go screw yourself.'' Between that time, and the walkout on November 6, he had five or six additional conversations with Fred and Gina Lieb about the fringe delinquencies, but all without success. Lawrence Diorio, business manager and chairman of the board for the Union's funds, testified that when he saw Respondent's Stamp Purchase Orders he spoke to Gina Lieb and told her that Respondent was in violation of the Agreement. She told him that she would not pay benefits ''on her company people.'' By letter dated October 18, Diorio wrote to Respondent that it was ''in violation of'' the agreement at the jobsite. The letter does not mention fringe benefits or stamps, but requests that Respondent contact the Union so that they can meet to resolve the situation. He testified that in conversations with Gina Lieb, she said that her people were not members of the Union, would receive no benefit from the fringes involved, and that she wouldn't pay for them. By letter dated August 5, 1992, Diorio again wrote to Respondent about its alleged violation of the Agreement, but this time he specifically referred to its failure to pay the fringe benefits for all employees performing laborers' work under article 30 of the agreement. By letter dated August 18, 1992, Gina Lieb wrote to the Union denying any violations of the agreement.

Libonati was an example of a witness who, while credible, was totally unable to answer a question directly. His answers were greatly extended and were often not responsive to the question asked. Gina Lieb was extremely evasive and not very credible. In answer to questions from General Counsel, her denials about her knowledge of the operation at the jobsite made me wonder how she could operate a business as large as hers. I conclude that what is lacking in this case is credibility, not ability or intelligence. I found Diorio to be direct in his answers, articulate and credible. I therefore find that at no time on or after August 15 did the Union ever inform Respondent that stamps for fringe benefits had to be paid only for the union members employed at the jobsite. I also find that beginning shortly after August, the Union notified Respondent that it was delinquent in its fringe benefit payments to the Union.

Even absent my finding made above that the Union never told Respondent that fringes had to be paid only for the union members, the result herein would be the same. A number of facts are clear herein: the Agreement executed by the parties on August 15 requires the Respondent to purchase stamps for the fringe benefits of all its employees who were performing laborers' work. There were employees other than Mackey, Galietta, and Warren at the jobsite who performed laborers' work. Respondent purchased stamps for the fringe

benefits only for Mackey, Galietta, and Warren. Even if I credited the testimony of Gina Lieb, under the parole evidence rule her testimony of an alleged oral agreement could not be used to vary the terms of the Agreement. *Gollin Block Co.*, 243 NLRB 350, 352 (1979); *Fayard Moving & Transportation*, 290 NLRB 26, 27 (1988). As the Board stated in *NDK Corp.*, 278 NLRB 1035 (1986):

> National labor policy requires that evidence of oral agreements be unavailing to vary the provisions of a written collective bargaining agreement valid on its face. We agree that the Respondent was bound by the terms of the agreement it entered into for the term of the agreement and that it could not establish by parole testimony an oral understanding that varied the terms of the written agreement.

I therefore find that by unilaterally failing and refusing to make the required payments to the Union's Health Benefit Fund, the Pension Fund, the Training/Educational Fund, the L.E.C.E.T. Fund, and the Savings Fund (clearly, mandatory subjects of bargaining) without the prior consent of the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

## CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about August 15, 1991, by virtue of a collective-bargaining agreement executed on that day, the Union has been the exclusive collective-bargaining representative of Respondent's employees who perform laborers' work at the jobsite.

4. By failing and refusing to pay the fringe benefits as specified in this collective bargaining agreement for all the employees performing laborers' work at the jobsite, without first negotiating with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As Respondent concluded its work at the jobsite on about September 17, 1992, it is not necessary to order Respondent to continue to adhere to the terms of the Agreement. However, I shall order that Respondent pay to the Union's Health Fund, Pension Fund, Training/Education Fund, L.E.C.E.T. Fund, and the Savings Fund Single Stamp Payment the amount specified in the agreement for every employee (other than Mackey, Warren, and Galietta) who performed laborers' work at the jobsite between August 15, 1991, and September 17, 1992. If any of these employees for whom benefits were not paid suffered a loss during this period due to Respondent's failure to pay for these fringe benefits, Respondent shall reimburse the employees, with interest, for the loss they suffered.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

## ORDER

The Respondent, F. G. Lieb Construction Company, Cincinattus, New York, its owners, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to comply with all the terms of its collective-bargaining agreement with the Union executed on August 15, 1991, without first negotiating with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay to the Union the amounts specified in the collective-bargaining agreement executed on August 15, 1991 for its Health Fund, Pension Fund, Training/Education Fund, L.E.C.E.T. Fund, and the Savings Fund Single Stamp Payment for all employees who performed laborers' work at the jobsite between August 15, 1991, and September 17, 1992, except for Wayne Mackey, Patrick Galietta, and Calvin Warren, for whom these benefits were paid by Respondent.

(b) Reimburse these employees, with interest, for any loss they may have suffered due to Respondent's failure to contribute to these funds.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its office in Cincinnatus, New York, and at each of its jobsites, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to abide by the terms of our collective-bargaining agreement executed on August 15, 1991, with Laborers' Local 17, Laborers' International Union of North America, AFL–CIO (the Union), the exclusive collective-bargaining representative of our employees performing laborers' work at our jobsite in Napanoch, New York.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL pay to the Union the amount specified in the agreement for its Health Fund, Pension Fund, Training/Education Fund, L.E.C.E.T. Fund, and the Savings Fund Single Stamp Payment for each of our employees who performed laborers' work at the Napanoch, New York jobsite for the period August 15, 1991, through September 17, 1992, except for the three employees for whom these benefits were paid.

WE WILL make whole any such employee who suffered a loss due to our failure to make these payments during this period.

F. G. LIEB CONSTRUCTION COMPANY